

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

4-21-17

77-7097

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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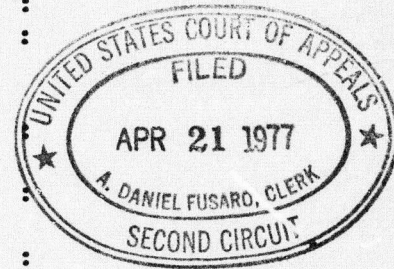
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THE MEDICAL SOCIETY OF THE STATE OF :
NEW YORK, a New York not-for-profit :
corporation, MORTON M. KOFF, M.D., :
MILTON POSENBERG, M.D., and JANE DOE, :

Plaintiffs-Appellees, :
-against- :

PHILIP TOIA, as Commissioner of the :
Department of Social Service, and :
ROBERT P. WHALEN, M.D., as Commissioner :
of Health of the State of New York, :

Defendants-Appellants. :
-----X



REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

	<u>PAGE</u>
Statement.....	1
Questions Presented.....	1
POINT I - THE COURT HAS NO JURISDICTION TO HEAR THIS ACTION.....	2
POINT II - THIS ACTION IS NOT RIPE.....	14
POINT III - THE DISTRICT COURT IMPROPERLY ISSUED A PRELIMINARY INJUNCTION.....	17
Conclusion.....	19

TABLE OF CASES

	<u>PAGE</u>
<u>American Physicians & Surgeons v. Mathews</u> , 395 F. Supp. 125 (N.D. Ill. 1975) (3 JJ court) affd. 423 U.S. 975.....	13
<u>American Trucking Assoc. v. United States</u> , 344 U.S. 298 (1953).....	7
<u>Andrews v. Maher</u> , 525 F. 2d 113 (2d Cir. 1975).....	11
<u>Arizona v. California</u> , 373 U.S. 546 (1963).....	7
<u>California Banking Assoc. v. Schultz</u> , 416 U.S. 21.....	13
<u>Dandridge v. Williams</u> , 397 U.S. 471 (1970).....	8, 11
<u>Dent v. West Virginia</u> , 129 U.S. 114 (1889).....	13a
<u>Dopp v. Franklin National Bank</u> , 461 F. 2d 873 (2d Cir. 1972).....	17
<u>Eisen v. Eastman</u> , 421 F. 2d 560 (2d Cir. 1969) cert. den. 400 U.S. 841 (1970).....	15
<u>Ferro v. Lavine</u> , 46 A D 2d 313 (4th Dept. 1974).....	11
<u>Geduldig v. Aiello</u> , 417 U.S. 484 (1974).....	11
<u>Grayned v. City of Rockford</u> , 408 U.S. 104 (1972).....	4, 6
<u>Groves v. Minnesota</u> , 272 U.S. 425 (1926).....	13a
<u>Hynes v. Mayor of Oradell</u> , 425 U.S. 610 (1970).....	3
<u>Jimenez v. Weinberger</u> , 417 U.S. 628 (1974).....	10
<u>Klein v. Nassau County Medical Center</u> , 409 F. Supp. 731 (E.D.N. 1976) (3 JJ Ct.) appeal pending.....	11
<u>Lichter v. United States</u> , 334 U.S. 742 (1948).....	7

	<u>PAGE</u>
<u>McGinnis v. Royster</u> , 1410 U.S. 263 (1973).....	10
<u>NBC v. United States</u> , 319 U.S. 190 (1943).....	7
<u>Plano v. Baker</u> , 504 F. 2d 595 (2d Cir. 1974).....	15
<u>Rasulis v. Weinberger</u> , 502 F. 2d 1006 (7th Cir. 1974).....	14
<u>Red Lion Broadcasting Co. v. F.C.C.</u> , 395 U.S. 397 (1969).....	15
<u>Ritti Johnson & Co. v. SEC.</u> , 198 F. 2d 690 (2d Cir. 1952) cert. den. 344 U.S. 855.....	7
<u>Robinson v. California</u> , 370 U.S. 66 (1972).....	13a
<u>Rosado v. Wyman</u> , 397 U.S. 397 (1971).....	15

	<u>PAGE</u>
St. Louis L.M. & S.R. Co. v. Taylor, 210 U.S. 281 (1905).....	7
U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).....	10
U.S. Dept. of Agriculture v. Murry, 413 U.S. 509 (1973)	10
United States v. Petrillo, 332 U.S. 1.....	6
Vuitch v. United States, 402 U.S. 62 (1971).....	6
Whaler v. Roe _____ U.S. _____ 45 U.S.L.W. 4166.....	13a
Weinberger v. Salfi, 422 U.S. 749 (1975).....	9, 10
Yakus v. United States, 321 U.S. 414 (1944).....	7

OTHER AUTHORITIES

Amsterdam, <u>The Void for Vagueness Doctrine in the Supreme Court</u> , 1090 Pa. L. Rev. 67 (1960).....	3
5A Moore, <u>Federal Practice</u> , para. 52.04.....	17

United States Statutes

28 U.S.C. § 1331.....	12
28 U.S.C. § 1343(3).....	2, 11
42 U.S.C. § 1331.....	14

New York Statute

Social Services Law §§ 65-a(5).....	16, 17, 18
-------------------------------------	------------

New York Regulations

10 N.Y.C.R.R. 85.1.....	5
10 N.Y.C.R.R. 85.2.....	4
18 N.Y.C.R.R. 358.4(a).....	14

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Plaintiffs-Appellees, :

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS

Statement

This brief is submitted on behalf of the defendants-
appellants in reply to the brief of the plaintiffs-appellees.

Questions Presented

1. Does this Court have jurisdiction to hear
this action?
2. Is this action ripe?
3. Did the District Court improperly issue a
preliminary injunction?

POINT I

THE COURT HAS NO JURISDICTION
TO HEAR THIS ACTION

Plaintiffs-Appellees do not allege a constitutional question sufficiently substantial to sustain the Court's jurisdiction under 28 U.S.C. § 1343(3).

Plaintiffs-appellees' (hereinafter plaintiffs) attempt to bolster the District Court's finding that a sufficiently substantial constitutional question was alleged to support the Court's pendant jurisdiction under 28 USC § 1343(3) fails. First, as indicated in the defendants-appellants' main brief, there is no right to privacy that has been violated by New York Social Services Law § 365-a(5). Second, they present to this Court no constitutional issue sufficiently substantial to support jurisdiction under 28 USC § 1343 (3).

The statute in question clearly creates no issue of a denial of due process. Plaintiffs' argue essentially that NYSSL § 365-a(5) is void for vagueness. Plaintiffs have a complete misconception of the doctrine which they are

actually asking this Court to apply. The "void for vagueness" doctrine, or plaintiffs' variant of it, is completely irrelevant to the case at bar since the doctrine is designed to require a statute to put persons to whom it may apply on fair notice as to what is required of them, where failure to do what is required may result in a penalty. This is not the case here. The statute and regulations in question do not forbid or command any physician or patient to do anything or to refrain from doing anything on pain of any penalty.

That a "void for vagueness" analysis is irrelevant to this case is plain from a reading of the cases cited by plaintiffs in their brief. Those cases concern the problem of putting a citizen on fair notice as to what is required of him to avoid running afoul of the criminal law or penalty statutes and involve the potential chilling of a fundamental right under the First Amendment. See Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). Amsterdam, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 115 (1960).

Assuming arguendo that vagueness analysis is somehow relevant to this case, the statute and regulations here are not at all vague. A cursory examination of the statute and supporting regulations show this to be true. The anti-noise ordinance upheld in Grayned v. City of Rockford, 408 U.S. 104 (1972) against a void for vagueness claim would be far more "vague" than the statute and regulations challenged in this case. That ordinance reads:

"No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

The claim that "medically indicated tisk" is a meaningless phrase is false since that phrase is given ample substance in the regulations promulgated thereunder. 10 NYCRR 85.2.

The claim that "severe pain" is meaningless also is without merit. It is given ample specific substance in the regulations promulgated pursuant to this section.

10 NYCRR 85.1.

Plaintiffs' argument that "severe pain" is unconstitutionally vague as inherently subjective proves too much. Their argument boils down in the final analysis to the proposition that no standards based on patient suffering are permissible since all pain is subjective. However, patient suffering is obviously a reasonable criterion by which to evaluate medical urgency and emergency needs and is one that is used by physicians every day. That this may be subjective to some extent is obvious and unavoidable in view of the human condition, but it makes the criterion no less reasonable. Certainly it is not unreasonable to assume that patients in great pain will make that pain known.*

In attacking "severe pain" as a meaningless phrase, plaintiffs ignore the fact that "we can never expect

* Plaintiff-physicians now admit that plaintiff Doe's statements were sufficiently comprehensible since they did operate on her. (Appellees' Brief, p. 47, Note ***)

mathematical certainty from our language". Grayned v. City of Rockford, supra, at 110. Severe pain is in fact a perfectly workable and reasonable phrase. Indeed, plaintiffs, contrary to their claims, do in fact seem to know what "severe pain" means because the Amended Complaint alleges (par. 12; A-151) that one plaintiff does not suffer "severe pain". The total absence of any merit in plaintiffs' claim is clear in the light of the Supreme Court's decision in Vuitch v. United States, 402 U.S. 62 (1971). There the Supreme Court found that the word "health" [of a mother] in a criminal abortion statute was not unconstitutionally vague. See too: U.S. v. Petrillo, 332 U.S. 1, 7-8.

The gravamen of plaintiffs' complaint is that the Commissioner of Health was given too much discretion to give substance to these phrases in the form of operative regulations. The claim in effect is one of unconstitutional delegation of legislative power. The claim is clearly devoid of merit. While the federal government since its beginning has delegated its power lavishly to federal officials and agencies, it is rare indeed that the Supreme Court has held that Congress

exceeded permissible bounds in so doing. Rather the Court has consistently upheld Congressional delegations of law-making power to Administrative officials. E.g., Arizona v. California, 373 U.S. 546 (1963); Lichter v. United States, 334 U.S. 742 (1948); American Trucking Assoc. v. United States, 344 U.S. 298 (1953); Yakus v. United States, 321 U.S. 414 (1944); NBC v. United States, 319 U.S. 190 (1943); St. Louis I.M. & S.R. Co. v. Taylor, 210 U.S. 281 (1905). See also Ritti Johnson & Co., et al v. Securities and Exchange Commission, 198 F. 2d 690, 695 (2d Cir. 1952), cert. den. 344 U.S. 855.

The federal judiciary has no authority by which to deprive the State Legislatures of a right to delegate co-extensive with that of Congress.

Even a cursory examination of the regulation demonstrates that they are reasonably and indeed amply specific implementation of the Legislature's mandate. It is certainly reasonable for the Legislature to set forth general statutory guidelines and have a specialized agency fill in the substance in the form of regulations. This has long been accepted in our modern complex society.

Similarly, plaintiffs' claim of a denial of equal protection is neither serious nor substantial. In overturning a lower Court finding in Dandridge v. Williams, 397 U.S. 471 (1970) that the Maryland statute was overreaching and overboard, the Court stated:

"But the concept of "overreaching" has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. [footnote omitted]. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical Co., 348 U.S. 483, 488. That era long ago passed into history. Ferguson v. Skrupa, 372 U.S. 726.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426.

In Weinberger v. Salfi, 422 U.S. 749 (1975) the Court again made clear that "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." 422 US at 772, as long as there is no discrimination based on a legislative desire to harm "a politically unpopular group", 422 U.S. at 772 [quoting from

U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)] or "on the basis of criteria which bear no rational relation to a legitimate legislative goal. Jimenez v. Weinberger, 417 U.S. 628, 636 (1974); U.S. Dept. of Agriculture v. Murry, 413 U.S. 509, 513-514 (1973)." 422 U.S. at 772, McGinnis v. Roysler, 410 U.S. 263, 270 (1973).

A statute does not offend the constitution under the rationale of Weinberge v. Salfi, supra because it filters out some who were not the object of the legislation. The question is whether the Legislature

"its concern having been reasonable aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." Weinberger v. Salfi, supra, 422 US at 477.

Here, no exclusion has occurred by fiat. Each case may be considered on its merits. No individual is excluded

who requires a medically necessary operation.

The goal of NYSSL § 365-a(5) is to maintain programs that are the most cost effective so that the most essential and critical medical needs and services are met and to ensure that Medicaid recipients do not receive medically unnecessary surgery that often results in great injury or even death. That the former goal does not violate the equal protection clause was made clear by the Court in Dandridge v. Williams, supra and more recently in Geduldig v. Aiello, 417 U.S. 484 (1974).

That the lines drawn do not satisfy plaintiffs because they think they could be drawn differently, or because they believe there are other methods that do the same task, can in no way vitiate, in the name of the Equal Protection Clause, the lines drawn by the Legislature.*

Nor does a supremacy clause question support jurisdiction under 28 U.S.C. § 1343(3). Andrews v. Maher, 525 F. 2d 113 (2d Cir., 1975).

* As amply pointed out to the Court below, the Hospital Utilization Review Program and the Professional Standards Review Organization program are post-operation, not pre-operation programs.

Plaintiffs attempt to make much of the "irrationality" of automatically including vasectomies and abortions in the reimbursable category. They fail utterly to realize that such inclusions are required by Court order. Ferro v. Lavine, 46 A.D. 2d 313 (4th Dept., 1974) (vasectomies); Klein v. Nassau County Medical Center, 409 F. Supp. 731 (E.D.N.Y., 1976) (3 JJ Court), appeal pending. (abortions).

The Court has No Jurisdiction under 28 U.S.C. § 1331

Plaintiff Koff admittedly performs no surgery (A.224) and thus has no pecuniary interest in this statute. Plaintiff Doe has admittedly received an operation (Brief of Appellees, p. 47, note) so this action is moot as to her. Plaintiff Ortega presents merely "speculative allegations of indirect, nonpecuniary benefits" that "may not be used to meet the amount in controversy requirements" Black v. Beame, ____ F.2d ____, slip op. no. 638, p. 1991 (2d Cir., Feb. 24, 1977). The Medical Society has made no claim, and indeed could have no claim, of pecuniary damage to itself. Plaintiff Rosenberg has also presented no evidence or made no substantial allegation about the pecuniary benefit to him of operations performed for Medicaid eligible patients. The question is not the high cost of medical care as claimed by the plaintiffs but the monetary value of this care to a particular plaintiff.

Nor is the problem, as plaintiffs' claim, the value of injuries to their constitutional rights, since as

shown above, plaintiffs have no constitutional rights that are being violated by the statute and regulations at issue here.

We commend to this Court the opinion in American Physicians & Surgeons v. Mathews, 395 F. Supp. 125 (N.D. Ill. 1975) (3 judge court) aff'd. 423 U.S. 975, cited by us (Main br. p. 15) which rejected identical arguments as made here, citing Rasulis v. Weinberger, 502 F. 2d 10006 (7th Cir. 1974). In the course of the American Physician opinion the Court quoted from a Senate Committee on Finance Report criticizing "unnecessary surgery as not consistent with proper health care", upheld statutory creation of a body to oversee whether elective surgery is medically necessary and characterized this "merely provides standards for the dispensation of Federal Funds" [as here]. That court rejected the claim of vagueness, due process, overbreath and privacy [In this citing California Bankers Ass'n. v. Shultz, 416 U.S. 21]. We would regard the reasoning of that case as compelling here and its unanimous affirmance by the Supreme Court as a strong recommendation.

It cannot be gainsaid that the State would have the right to establish standards the practitioner must meet in order to come within the category of services qualified for reimbursement under the Medicaid program, as does the Federal statute for Medicare. This is buttressed by the established authority of the State to impose proficiency tests. Dent v. West Virginia, 129 U.S. 114, 123-25 (1889); Groves v. Minnesota, 272 U.S. 425, 428-29 (1926); Robinson v. California, 370 U.S. 660, 664 (1972) and oversee performance Whalen v. Roe, _____ U.S. _____ 45 U.S. L.W. 4166.*

-13-a

* Interesting excerpts from "The Average Man Fights Back" appeared on page 31 of the N.Y. Post of April 20, 1977. Among the comment is this: "Avoiding an operation you don't need is ultimately a personal decision, but it can be powerfully influenced by a second opinion from another surgeon who has no financial stake in the decision. This has been pioneered mainly in New York City and the results to date are dramatic. --[this] standard practice in New York is likely to spread rapidly to the rest of the country." We are informed that the N.Y. State Trial Lawyers Association has adopted a resolution insisting on the second opinion before surgery as an indispensable safeguard. Copies of the N.Y. post article and the resolution [when obtained] will be furnished to this Court.

POINT II

THIS ACTION IS NOT RIPE

Plaintiffs have attempted to make a lawsuit where none exists. They have presented to the Court two patients with sympathetic problems and claim that the State is condemning them to disfigurement and discomfort. Yet, it is the patients' physicians who have so condemned them.* State officials with responsibility for interpreting the statute and its regulations repeatedly stated that the plaintiff patients would be covered. Their physicians and their attorneys repeatedly ignored this statement.

The physicians' testimony of their belief of what the statute covers is of no value. It is the interpretation

*In any event, plaintiffs have stated in their brief that plaintiff Doe has now received her operation so this action is moot as to her.

provided by those charged with interpreting the law that is controlling. Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 397 (1969); Rosado v. Wyman, 397 U.S. 397 (1971).

Plaintiffs' position is as absurd as a plaintiff's claim that a defendant will not perform a contract when the plaintiff has not bothered to request performance and when the defendant claims that he is more than willing to perform his obligation under the contract, has always been willing, and is in the process of performing similar obligations under numerous other contracts.

The point is not that the plaintiffs must make administrative appeals when they would be of no value.* The point is simply that Ortega and Doe are demanding something that the State has given to others under similar circumstances.

* In any event, patients do have an administrative remedy. They can go to the local social services district office with a claim that they cannot obtain medical care and need documentary proof that they have a reimbursable claim. It is also a common practice for an individual to request that the local Social Services office locate a doctor for him who will perform the requested service. If denied this request they can request and receive a fair hearing pursuant to the method for all denials of assistance, pursuant to 18 NYCRR 358.4(a).

This Court has not abandoned the requirement of administrative exhaustion in suits brought pursuant to 28 U.S.C. § 1983, Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. den. 400 U.S. 841 (1970); Plano v. Baker, 504 F. 2d 595 (2d Cir. 1974). In any event, an action brought under 42 U.S.C. § 1331 would not escape any exception that may have been carved out for actions brought under the Civil Rights Act.

Plaintiffs' attempt to throw into the picture a host of other medical problems that they claim would not be reimbursed under NYSSL § 365-a(5) present no case or controversy and also points to the impropriety of these doctors representing the rights of any patients. Plaintiffs have presented no concrete examples of any individual actually deprived of surgery for any of these medical problems. They never moved to have a class certified. Defendants have been provided no opportunity to confront a particular individual's problems to determine if he is covered under the statute.

The ripeness issue presents in clear relief the impropriety of permitting physicians to represent the interest of patients. Doe and Ortega admittedly presented severe physical problems. Yet their physicians continued to maintain that they could not obtain the necessary surgical relief in the face of repeated statements by the state officials charged with administering the program that those in similar circumstances were eligible for reimbursable surgery. The

bona fides of the physicians are not, under these circumstances, clear.*

POINT III

THE DISTRICT COURT IMPROPERLY ISSUED A PRELIMINARY INJUNCTION

Notwithstanding plaintiffs' insistence that the Court below held an evidentiary hearing (Appellees' Brief, p. 3, note ***), it is undisputed that the District Court neither viewed the witnesses' demeanor nor judged their credibility, but rather, made its determination solely on the pleadings, affidavits and depositions. Under exactly similar circumstances, this Court stated in Dopp v. Franklin National Bank, 461 F.2d 873 (2d Cir., 1972), that its discretion to review factual findings made under such circumstances is as broad as the lower court's. See, 5A Moore, Federal Practice para. 52.04.

The affidavits and depositions made clear that Dr. Seinfeld, plaintiff Rosenberg's partner, and Dr. Koff, have refused to take part in the Medicaid program, or recommend patients to others for surgery under the program (in Dr. Koff's

* As stated in the main brief in behalf of appellants, since NYSSL § 365-a(5) is also intended to protect patients from unneeded and potentially harmful surgery it is indeed anomalous to allow physicians to assert their rights.

case) merely because they do not like the paperwork. (A.209, 226).

The District Court erroneously accepted Drs. Seinfeld's and Koff's assertions about what the statute covered. Only in response to leading questions did both state that the new statute does not cover certain conditions. (A. 202, 222-23). The Court totally disregarded the affidavits and deposition of those state official charged with interpreting the statute that the only two concrete cases presented to the Court would most likely be covered. Clearly, the facts on which the Court issued its injunction were not facts but the misguided opinions of two physicians who object to the statute because of the paperwork involved and for no other stated reason.

The District Court also misrelied on the HEW letters presented to it, since they were written prior to the enactment of NYSSL § 365-a(5), were only preliminary statements and because negotiations between the State and HEW are continuing. In any event, were the State not in compliance with the Medicaid statute, HEW is required, after notice and a hearing, to cease making payments to the State. The Federal government is continuing to provide funds to the State and had not initiated any hearing to determine if such cut-off is warranted. Under these circumstances, and without a formal

statement from HEW, it must be assumed that the New York State plain continues to enjoy its approval.

In sum, the District Court erroneously found that plaintiffs had made a clear showing of success on the merits or had presented a case that was ripe for adjudication. In the meanwhile surgery is being performed by reason of this injunction which may well be unnecessary and yet is irretrievable as an accomplished fact-a cruel hoax for the benefit of some not too scrupulous or informed physicians.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
ENJOINING THE IMPLEMENTATION OF
NEW YORK SOCIAL SERVICES LAW
S 365-a(5) (a) (b) (c) and (e)

SHOULD BE REVERESED IN ALL RESPECTS

Dated: New York, New York
April 20, 1977

Respectfully submitted,

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STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

David L. Birch

being duly

sworn, deposes and says:

1. I am over 18 years of age, not a party to this action and reside at Two World Trade Center, New York, New York 10047 County of New York, State of New York.

2. On the 21st day of April, 1977, I served the annexed reply brief in the above entitled action on LeBoef, Lamb, Leib & MacRae attorneys for appellees a defendant herein by personally delivering to and leaving copies thereof with the said attorneys at 140 Broadway, N.Y., NY located at _____, County of New York New York.

David L. Birch

Sworn to before me this
21st day of April, 1977

Donald P. Silverman
Assistant Attorney General
of the State of New York